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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

In re ERIC S., et al., Persons Coming
Under the Juvenile Court Law.

2d Juv. No. B155412
(Super. Ct. Nos. J055797, J055798,
J059942, J059943)
(Ventura County)

VENTURA COUNTY HUMAN
SERVICES AGENCY,

Plaintiff and Respondent,

v.

ALYCE S., et al.,

Defendants and Appellants.

Alyce S. and Mark S. appeal a judgment of the juvenile court terminating parental rights. (Welf. & Inst. Code, § 366.26.)¹ Conceding that the dependency court had jurisdiction to remove the children from the home, Alyce S. and Mark S. contend that the court failed to treat their children as a "bonded sibling group" in determining adoptability and in terminating parental rights, that there was insufficient evidence of adoptability, and that the court improperly excluded evidence. The parents also contend that their beneficial relationship with the children, and beneficial relationships among the

¹ All statutory references are to the Welfare and Institutions Code unless otherwise stated.

siblings, precluded termination of parental rights. We conclude that the history of parental neglect supports termination of parental rights. We also conclude that there was no requirement to treat the children as a "bonded sibling group" as that phrase is used by the parents and, in any event, that the court fashioned orders to maintain sibling contact and preserve a strong sibling relationship. We affirm.

FACTS AND PROCEDURAL HISTORY

Alyce S. and Mark S. have six children: twins Kayla and Brittaney born in 2001, Jennifer born in 1998, Eric born in 1995, Shaun born in 1994, and James born in 1990. Alyce also has a daughter, Melody, who was born in or about 1986. This appeal concerns orders relating to Eric, Jennifer, Kayla and Brittaney.²

The dependency petitions were filed in September 2000 after Eric was found wandering alone and attempting to cross a highway. The petitions allege that the family home was in disarray, unsafe, and in an appallingly unsanitary condition. Among other things, there was cat feces throughout the home, food and trash on the floor, dirty dishes, and an overpowering odor in the home. Two-year-old Jennifer was found eating food off the floor with feces spilling from her diaper. The parents were also unaware that Eric was not in the house when he was found by the police.

The petitions also allege that both parents have serious mental health problems and many prior referrals to the Human Services Agency (HSA) concerning unsafe and unsanitary living conditions. In a prior dependency proceeding, Eric and Jennifer and their older siblings had been removed from parental custody for a year.

In addition, both parents have a history of criminal conduct and incarceration resulting from their mistreatment of their children. Alyce was convicted of cruelty to a child in 1991, 1999 and 2001, and Mark suffered similar convictions in 1991, 1999 and 2000. (Pen. Code, § 273a.) The parents were incarcerated for a significant period during the pendency of this proceeding.

² All references to the "minors" refer to Eric, Jennifer, Kayla and Brittaney only, unless otherwise specified.

In April 2001, Alyce and Mark withdrew their requests for a contested jurisdiction and disposition hearing, and agreed that no reunification services would be provided. The uncontested May 2001 jurisdiction order included findings by clear and convincing evidence that the minors had been neglected and left without provision for their support and care, that repeated interventions by HSA had not remediated the neglect, and that the parents were not capable of adequately caring for the children due to mental disabilities.

The court ordered psychological evaluations to assess the relationships between Eric and Jennifer and their parents, Eric and Jennifer and their prospective adoptive parents, and Eric and Jennifer and their older brothers, James and Shaun. Evaluations covering Kayla and Brittaney were not required because they were infants.

Prior to the December 2001 section 366.26 hearing, HSA submitted an assessment report covering contacts between the minors and other family members and the relationships among the siblings. An HSA log outlined services provided to the parents and observations by social workers concerning the minors' visits with parents and grandparents, and with each other and older siblings Shaun and James.

HSA had placed Eric with one foster family, and Jennifer, Kayla and Brittaney with another foster family. The HSA report stated that Eric's foster parents had arranged to adopt Eric, and that Jennifer, Kayla and Brittaney's foster parents had arranged to adopt those three children.

Dr. Clevert King's psychological evaluation states that Jennifer has a stronger attachment to her foster parents than to her natural parents, but that Eric was "more ambivalent about his attachments." Eric is bonded with his natural father and with his foster parents, and the thought of losing the attachment to either his natural father or foster parents "appears to make him sad." Dr. King's evaluation concludes that Eric would be "greatly harmed" if parental contact were terminated, but that continuing his or Jennifer's parental relationships "will not promote the child's well-being to such a degree that the benefit of maintaining the birthparent-child relationship would outweigh the well-being the child would gain in a permanent home with adoptive parents."

Dr. King's evaluation also states that Eric, Jennifer, Shaun, and James "appear to be attached to one another as siblings," that the "level of bonding between all of [the] siblings is substantial and positive." Dr. King concluded that separation is "likely [to] be detrimental" to Eric, but less so to Jennifer.

At the hearing, Dr. King testified that any harm to Eric caused by separating from his natural parents was reversible and could be healed by adoption. Also, Dr. King testified that Eric would face the same type of harm if separated from his foster parents. Dr. King concluded that, in any event, "adoption would be the best way to offer Eric the security and the stability and the love that he needs in order to develop normally," and that the greatest danger to Eric was continuing in the unstable home of Alyce and Mark, his natural parents.

After the hearing, the court found clear and convincing evidence that the minors were adoptable. The court concluded that Jennifer was bonded with her foster parents, but not her natural parents. The court stated that Eric presented a more "difficult issue" since he was attached to both his natural father and foster parents, but that Eric's natural father was not a "constructive or positive parental figure." The court found that a continuation of parental relationships would "ultimately be destructive." The court found that there were no extraordinary circumstances militating against termination of parental rights, but that "substantial sibling visitation" must be facilitated. The court ordered sibling contact once a week at a minimum.

DISCUSSION

Evidence Supports Finding that Minors Likely to be Adopted

In the uncontested May 2001 order, the court denied reunification services and found Alyce and Mark to be unfit as caregivers. With that order, the proceeding turned to the selection of a permanent plan to provide a stable home for the minors. (§ 366.26, subd. (b); *In re Jessie G.* (1997) 58 Cal.App.4th 1, 5-6.) Adoption is the preferred plan, but guardianship and long-term foster care are alternatives when adoptive parents cannot be located or in other special circumstances. (§ 366.26, subd. (b)(1)-(4);

Jessie G., *supra*, at p. 6.) For adoption to be selected, the juvenile court must make a finding by clear and convincing evidence that the minor is likely to be adopted.

(§ 366.26, subd. (c); *In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1648.)

Alyce and Mark contend that the juvenile court erred in finding that the minors were adoptable because Eric and the other three minors would be adopted by two separate families. Alyce and Mark argue that the minors are a "bonded sibling group" and that there is a presumption that bonded siblings are not adoptable unless they will be adopted together as a group or there is an express finding that group adoption is not in their best interests.³ We disagree.

There is no express or implied statutory presumption that a sibling relationship prevents separate adoption of the siblings. (See *In re Clifton B.* (2000) 81 Cal.App.4th 415, 426-427; *In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1187.) The statutory scheme reflects the importance of sibling relationships in dependency proceedings, but there is no statutory mandate or presumption that siblings must be adopted as a group, and no statutory authority which displaces adoption as the preferred permanent plan. (See, e.g., §§ 366.1, 366.21, 16002.)

As with other dependency issues, the juvenile court must balance any adverse effect of adoption on sibling relationships against the children's need for the stability and permanence of adoption. (See *In re Jasmine D.* (2000) 78 Cal.App.4th 1339, 1348-1349.) Guardianship and foster care are alternatives when a sibling group cannot be adopted as a unit, but those permanent plans are not favored because they do not provide a secure and permanent placement. (*In re Jose V.* (1996) 50 Cal.App.4th 1792, 1799.)

Moreover, the evidence does not demonstrate that the four minors were a "bonded sibling group." There were bonds between Eric and Jennifer and some evidence

³ We conclude in another section of this opinion that Alyce and Mark do not have standing to raise certain issues concerning the separate interests of the minors. Because HSA does not challenge standing to contest adoptability based on sibling bonding, we do not consider that question.

of bonds between Eric and Jennifer and their older siblings, but no evidence of bonding with Kayla or Brittaney who were removed from parental custody at birth.

We also reject Alyce and Mark's contention that the assessment report failed to adequately cover the nature and extent of the minors' contact with their siblings and other family members, or consider Eric's wishes regarding placement. The report and supporting evidence complied with statutory requirements by analyzing the minors' medical, developmental and emotional status and the likelihood that they will be adopted, and by evaluating the minors' contacts with their parents, grandparents, siblings and prospective adoptive parents. (§§ 361.5, subd. (g), 366.21, subd. (i), 366.22, subd. (b); *In re David H.* (1995) 33 Cal.App.4th 368, 377-378.) The report, service log and psychological evaluation show regular visits with family members and provide substantial evidence for the HSA placement recommendations.

Eric's wishes were also considered. (§ 366.26, subd. (h).) The record shows that Eric is too young to fully express his feelings about his future, but a statement that he wanted to live with his adoptive parents, together with the absence of any clearly stated wish to remain with his natural parents and siblings, support the finding by the juvenile court. (See *In re Leo M.* (1993) 19 Cal.App.4th 1583, 1592.)

Section 366.26(c)(1)(E) Does Not Apply

Where parent and child cannot be reunified, four statutory exceptions may prevent termination of parental rights and implementation of adoption as the permanent plan. (§ 366.26, subd. (c)(1)(A)-(D).) New section 366.26, subdivision (c)(1)(E) creates a fifth circumstance. Effective in January 2002, that subdivision permits the court to choose long-term foster care or guardianship over adoption if "[t]here would be substantial interference with a child's sibling relationship, taking into consideration the nature and extent of the relationship, including, but not limited to, whether the child was raised with a sibling in the same home, whether the child shared significant common experiences or has existing close and strong bonds with a sibling, and whether ongoing contact is in the child's best interest, including the child's long-term emotional interest, as compared to the benefit of legal permanence through adoption." (*Ibid.*)

Contrary to Alyce and Mark's contention, the new statute does not apply in this case. The section 366.26 hearing was conducted before the new statute became effective and the statute does not apply retroactively. (*In re Raymond E.* (2002) 97 Cal.App.4th 613, 615-618.) Section 366.26, subdivision (c)(1)(E) "was not accompanied by any expression of intent or language making it retroactive" and, therefore, the presumption of prospective application governs. (*Raymond E.*, *supra*, at p. 618.) Also, because termination of parental rights is not punishment, section 366.26, subdivision (c)(1)(E) is not analogous to statutes reducing punishment for a crime which generally apply retroactively. And, legislative history expressing the importance of the statute does not infer an intent that it has retroactive effect. (See *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1213.)

Even if section 366.26, subdivision (c)(1)(E) applied, substantial evidence supports the order terminating parental rights. Preserving parental rights would require abandonment of adoption as the permanent plan. Despite sibling bonds, the juvenile court could reasonably find that the benefit of stable permanent homes through adoption outweighed the detriment of the less-favored permanent plans of long-term foster care or guardianship.

In addition, the termination of parental rights will not result in the termination of sibling relationships. The HSA and the juvenile court itself demonstrated sensitivity to the needs of the minors to maintain relationships with their siblings. The court, on HSA's recommendation, ordered a continuation of regular and frequent contact among the minors.

Section 366.26(c)(1)(A) Exception Not Established

The parents contend that, even if the minors are adoptable, the juvenile court erred in terminating parental rights because there was compelling evidence that the parents "maintained regular visitation and contact with the [children] and the [children] would benefit from continuing the relationship." (§ 366.26, subd. (c)(1)(A).) To justify application of this statutory exception, the parent/child relationship must result "from the adult's attention to the child's needs for physical care, nourishment, comfort, affection and

stimulation." (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The court "balances the strength and quality of the natural parent/child relationship in a tenuous placement against the security and the sense of belonging a new family would confer. If severing the natural parent/child relationship would deprive the child of a substantial, positive emotional attachment such that the child would be greatly harmed, the preference for adoption is overcome and the natural parent's rights are not terminated." (*Ibid.*)

Here, it is undisputed that the parents regularly visited with the minors. But, the unfitness of the parents to provide care, nourishment, and comfort is also undisputed. Considering all of the circumstances, we conclude that the parents did not carry their burden of showing any compelling reason to deprive the minors of the benefit of a stable, permanent home with adoptive parents. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 826.)

We also reject the father's contention that the judicial interpretation of section 366.26, subdivision (c)(1)(A) violates due process by setting a standard of proof in excess of that required by the statute, namely that a parental relationship must be "positive" and "constructive." The standard established in *In re Autumn H.*, *supra*, 27 Cal.App.4th at page 575 is persuasive, and has been followed by numerous other courts, including this division. (See, e.g., *In re Jasmine D.*, *supra*, 78 Cal.App.4th at pp. 1348-1349; *In re Casey D.* (1999) 70 Cal.App.4th 38, 51; *In re Brandon C.* (1999) 71 Cal.App.4th 1530, 1534; *In re Derek W.*, *supra*, 73 Cal.App.4th at p. 827.)

No Conflict of Interest

Alyce and Mark assert that the attorney representing all four minors had a conflict of interest, and that separate counsel should have been appointed for each minor. They argue that one counsel could not represent each minor's interest in maintaining the sibling group as a whole. The father also asserts that, because of the conflict, the minors received ineffective assistance of counsel.

Alyce and Mark have no standing to raise this issue. Many courts have held that a parent has no standing to challenge the termination of parental rights on the ground that sibling relationships will be affected because that issue does not affect the

rights of the parent. (See, e.g., *In re Frank L.* (2000) 81 Cal.App.4th 700, 703-704; *In re Clifton B.*, *supra*, 81 Cal.App.4th at p. 425; *In re Devin M.* (1997) 58 Cal.App.4th 1538; *In re Jasmine J.* (1996) 46 Cal.App.4th 1802.) And, characterizing the purported conflict of interest as ineffective assistance of counsel does not alter the interests at issue.

Even if Alyce and Mark have standing, they waived their claims by failing to raise the bonded sibling group or conflict of interest issues in the juvenile court. (*In re Aaron B.* (1996) 46 Cal.App.4th 843, 846; *In re Anthony P.* (1995) 39 Cal.App.4th 635, 641.) In addition, Alyce and Mark do not show that their or the minors' rights were adversely affected by the minors' representation. (See *In re Candida S.* (1992) 7 Cal.App.4th 1240, 1252 [appointment of separate counsel requires actual, not potential, conflict of interest].) The record shows no basis to conclude that counsel, who advocated termination of parental rights, did so without considering sibling relationships or the best interest of each of the minors in obtaining a stable and permanent home. The record also shows that sibling relationships will be preserved despite termination of parental rights.

No Abuse of Discretion in Excluding Testimony

Alyce and Mark contend that they were denied a fair hearing when the juvenile court excluded testimony from the minors' half-sibling, 15-year-old Melody. A parent's due process right to present evidence in a dependency proceeding is limited to relevant evidence of significant probative value to the contested issues. (*Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1147.) Here, the trial court acted within its discretion in excluding Melody's testimony as having minimal probative value.

Mark argues that recent legislative changes have placed greater importance on maintaining sibling relationships, but fails to show how the importance of sibling relationships generally affects the relevance of Melody's proffered testimony in this case. The party seeking to introduce evidence has the burden of making its substance, purpose, and relevance known to the court. (See *In re Mark C.* (1992) 7 Cal.App.4th 433, 445.) The record shows that Alyce and Mark did not know what testimony they expected to elicit from Melody, and could only state that she would testify to "her thoughts and

interests" regarding the "ultimate outcome" of the case. Also, Melody did not live with the minors and there is nothing in the record revealing the extent of Melody's knowledge, if any, regarding sibling relationships among the minors.

Moreover, there was other evidence of sibling bonding, parent/child bonding, and the parents' fitness. It is unlikely that Melody's testimony would have had any effect on the outcome of the case. (*In re Amy M.* (1991) 232 Cal.App.3d 849, 868.)

Trial Court Bias Not Shown

Alyce contends that she was denied a fair hearing because the judge made an inappropriate comment concerning her fitness, and unreasonably refused to continue the section 366.26 hearing due to her medical condition. No reasonable person would doubt the court's fairness or impartiality on the basis of these actions.

In acknowledging that the minors had positive interactions with each other, the court stated that they had not learned that behavior from their parents. Even if this comment was inappropriate, it was an isolated remark. It was also consistent with evidence that the parents were unfit as caregivers. (See *Jack Farenbaugh & Son v. Belmont Construction, Inc.* (1987) 194 Cal.App.3d 1023, 1031-1032 [comments on the merits of a case outside the presence of a jury are permissible].)

We also reject Alyce's assertion that the refusal to continue the hearing because of her illness reveals the court's lack of courtesy and judicial objectivity. Since the request for a continuance was made during the hearing when Alyce was present in court for the purpose of giving testimony, there was no abuse of discretion in denying the request. We see nothing in the juvenile court's decision except the exercise of discretion in efficiently managing the court's calendar.

CONCLUSION

In this case, substantial resources were expended first in an effort to preserve the family unit and, when that effort proved futile, in an endeavor to provide a safe and healthy environment for the children. There was no error in the handling of this matter by the HSA or the juvenile court.

The judgment (order) is affirmed.

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PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

Charles W. Campbell, Judge
Superior Court County of Ventura

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